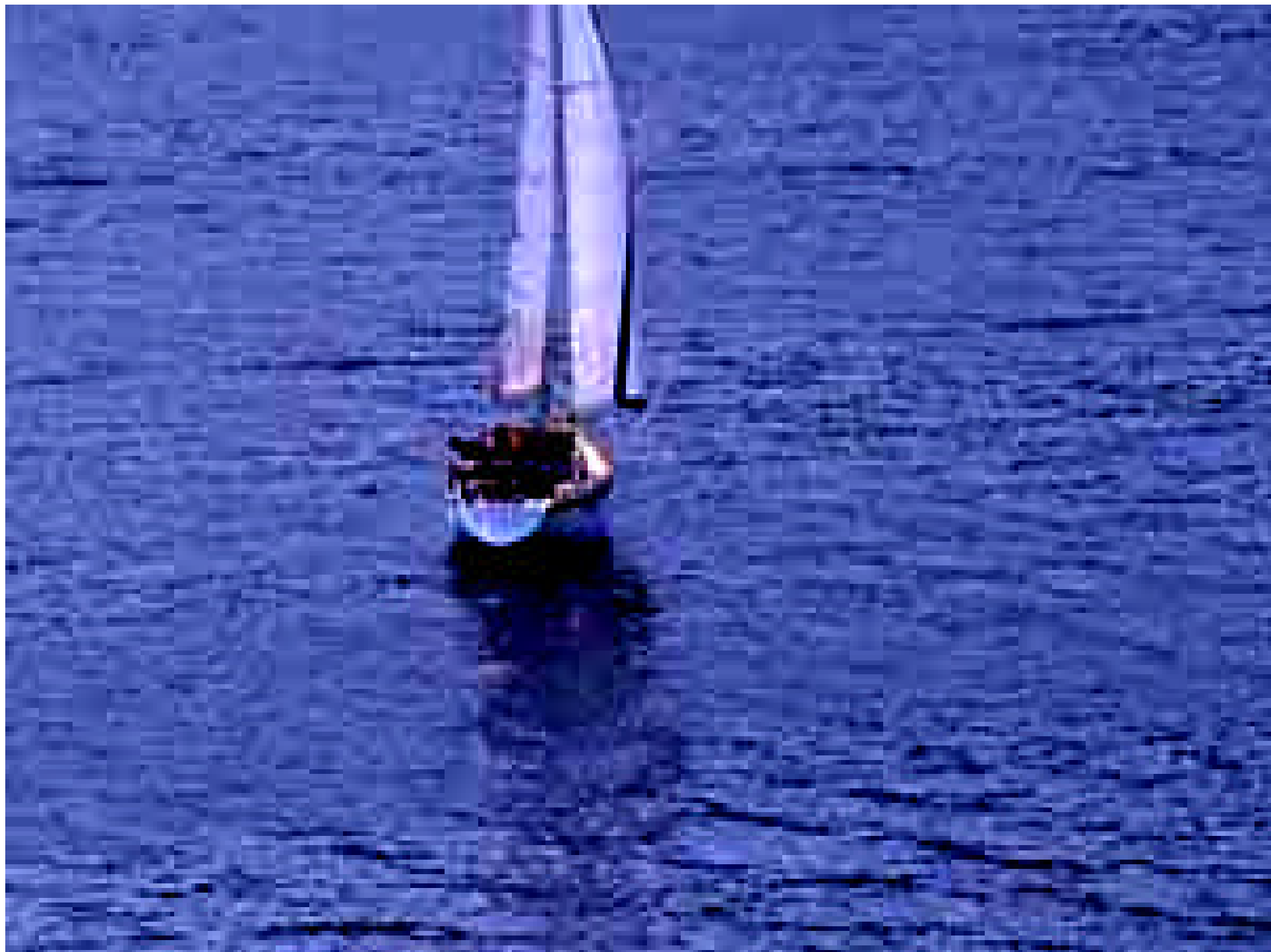


LEGAL REVIEW **of** **DECISION DOCUMENTS**

SCOTT MURPHY
CPT, JA, U.S. Army
Assistant Counsel for Civil Works
Office of the Chief Counsel,
HQUSACE



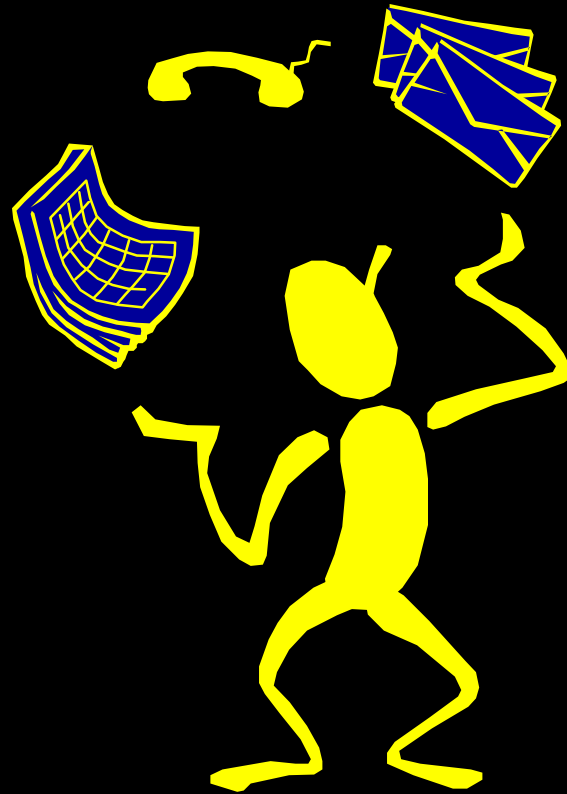
APPROACH & SCOPE

- Follows structure of feasibility report
- Issues, case examples as we go, lessons learned
- Scope = One year of CECC-J review of decision docs



REFERENCES GOVERNING DECISION DOCUMENTS

**LAWS
REGULATIONS
GUIDANCE:
EPs, ECs,
LETTERS**



**P. 3-5
App. A**

7 STEPS TO A LEGALLY SUFFICIENT DECISION DOCUMENT

1. PROCESS QUESTIONS

2. AUTHORITY

3. PROJECT PURPOSE

4. PROJECT AREA

5. PLAN SELECTION

6. PLAN IMPLEMENTATION

7. ENVIRONMENTAL COMPLIANCE

P. 5

1. PROCESS QUESTIONS

2. AUTHORITY

3. PROJECT PURPOSE

4. PROJECT AREA

5. PLAN SELECTION

6. PLAN IMPLEMENTATION

7. ENVIRONMENTAL COMPLIANCE

PROCESS QUESTIONS

TYPE OF REPORT

Recons, AFBs, IRCs, IPs: **ONLY IF
LEGAL ISSUE RAISED**

Feasibility Reports, GRRs: **MOST**

LRRs: **LESS (normally only econ
update)**



PROCESS QUESTIONS



STAGE OF REVIEW

- DRAFT REPORT?
- PRIOR REVIEW?
- APPROVAL AUTHORITY?
- APPROVAL PRIOR TO PCA?

PROCESS QUESTIONS

DISTRICT LEGAL REVIEW

**Chief Counsel's 26 April 1996 letter
Appendix A of EC 1165-2-203**

PROCESS QUESTIONS: DISTRICT LEGAL REVIEW

MODEL LANGUAGE

**“The report for _____,
including all associated documents
required by the National Environmental
Policy Act, has been fully reviewed by
the Office of Counsel, _____ District
and is approved as legally sufficient”**

PROCESS QUESTIONS: DISTRICT LEGAL REVIEW

CONDITIONAL

“The report for the _____ Project has been fully reviewed by the Office of Counsel, _____ District and is approved as legally sufficient, **subject to inclusion of the assurance of non-federal intent and financial capability.**”

PROCESS QUESTIONS: DISTRICT LEGAL REVIEW

LIMITED

“... by this certification, the Office of Counsel *is not approving*”

PROCESS QUESTIONS: DISTRICT LEGAL REVIEW

“MERE REVIEW”

**“The report for the _____ Project has
been reviewed by the Office of Counsel,
_____ District.”**

1. PROCESS QUESTIONS

2. AUTHORITY

3. PROJECT PURPOSE

4. PROJECT AREA

5. PLAN SELECTION

6. PLAN IMPLEMENTATION

7. ENVIRONMENTAL COMPLIANCE

AUTHORITY



EXPLANATION OF AUTHORITY

- 1. CITE AND QUOTE STATUTE,
HOUSE/SENATE REPORT**
- 2. EXPLAIN HOW ACT OF
CONGRESS PERMITS
PROJECT, REPORT**



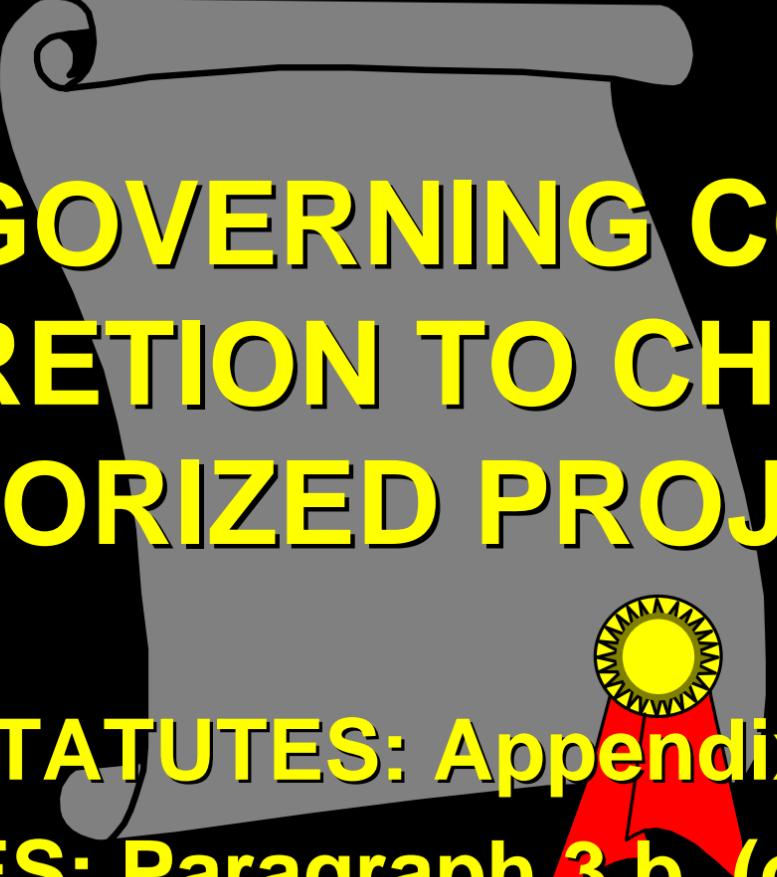
AUTHORITY

POST-AUTHORIZATION CHANGES

**Chief of Engineers has limited
discretion to alter projects after
their authorization by Congress**

P. 13

AUTHORITY: POST-AUTHORIZATION CHANGES



**LAW GOVERNING CORPS'
DISCRETION TO CHANGE
AUTHORIZED PROJECTS**

STATUTES: Appendix G

CASES: Paragraph 3.b. (outline)

POLICY: ER 1105-2-100 para. 2-17

AUTHORITY: POST-AUTHORIZATION CHANGES

**GENERAL RULE (EDF v.
Alexander) restricts
“material” changes in:**

Project purpose

Geographic area served

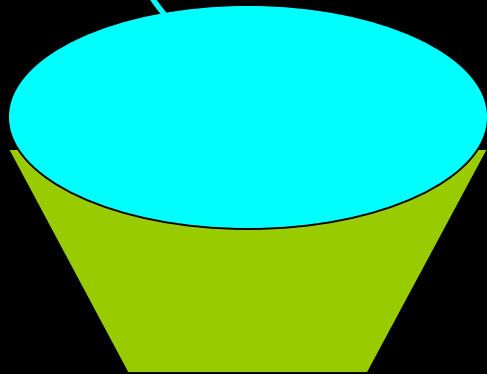
Project “scope”

Project cost

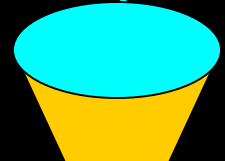
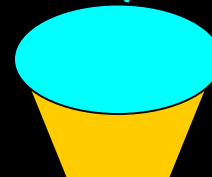
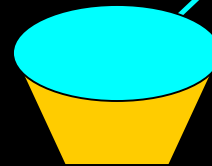
Plan of improvement

P. 13-14

**AUTHORIZED
PLAN**



**NEW
PLAN**



P. 13-14

AUTHORITY: POST-AUTHORIZATION CHANGES

**Two exceptions to
GENERAL RULE barring
“material changes”**

- 1. DESIGN REFINEMENTS**
- 2. NEW SOCIAL, PHYSICAL OR
LEGAL CONDITIONS**

AUTHORITY: POST-AUTHORIZATION CHANGES

**AUTHORIZED
FLOOD
CONTROL
PLAN**

**NEW
FLOOD
CONTROL
PLAN**

**(AVOIDS DUMPING
OF RAW SEWAGE
DOWNSTREAM IN
VIOLATION OF
STATE WQ LAWS)**

AUTHORITY: POST-AUTHORIZATION CHANGES

**OTHER CASE LAW:
CHANGES OK SO LONG AS
NOT “ARBITRARY AND
CAPRICIOUS”**

P. 14-15

AUTHORITY: POST-AUTHORIZATION CHANGES

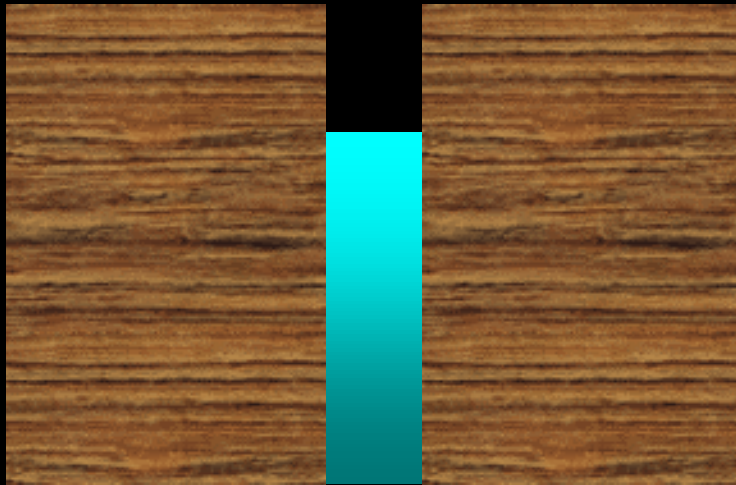
1. NOT A POLICY QUESTION

2. DOCUMENTATION

**3. DON'T FORGET
STATUTORY SOLUTIONS**

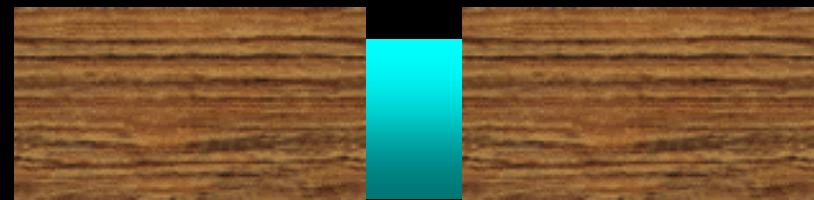
AUTHORITY: POST-AUTHORIZATION CHANGES

AUTHORIZED PLAN



500-YR FLOOD

SELECTED PLAN?



150-YR FLOOD

AUTHORITY: POST-AUTHORIZATION CHANGES

33 U.S.C. § 701m

“ . . . The Chief of Engineers is also authorized in his discretion to modify the plan for any dam or other work heretofore or hereafter authorized so that such dam or work will be smaller than originally planned with a view to completing a useful improvement within an authorization: Provided, That the smaller structure shall be located on the chosen site so that it will be feasible at some future time to enlarge the work in order to permit the full utilization of the site . . . ”

App. F

1. PROCESS QUESTIONS

2. AUTHORITY

3. PROJECT PURPOSE

4. PROJECT AREA

5. PLAN SELECTION

6. PLAN IMPLEMENTATION

7. ENVIRONMENTAL COMPLIANCE



PROJECT PURPOSE

NAVIGATION

- 1. Disposal facilities are GNF under Section 201 of WRDA 96**
- 2. Projects must have dredged material management plans**
- 3. Refer to PGL 40, 47**



PROJECT PURPOSE

STRUCTURAL FLOOD CONTROL

- 1. WRDA 96: 65/35 cost sharing**
- 2. Ancillary project purposes**
- 3. Floodplain management
plans under Section 402 of
WRDA 96**

P. 22-23



PROJECT PURPOSE

ENVIRONMENTAL “WORK”

- 1. Program/project funding limits?**
- 2. Prior Corps project?**
- 3. Mitigate, restore or enhance?**
- 4. Link between Corps/project/work?**

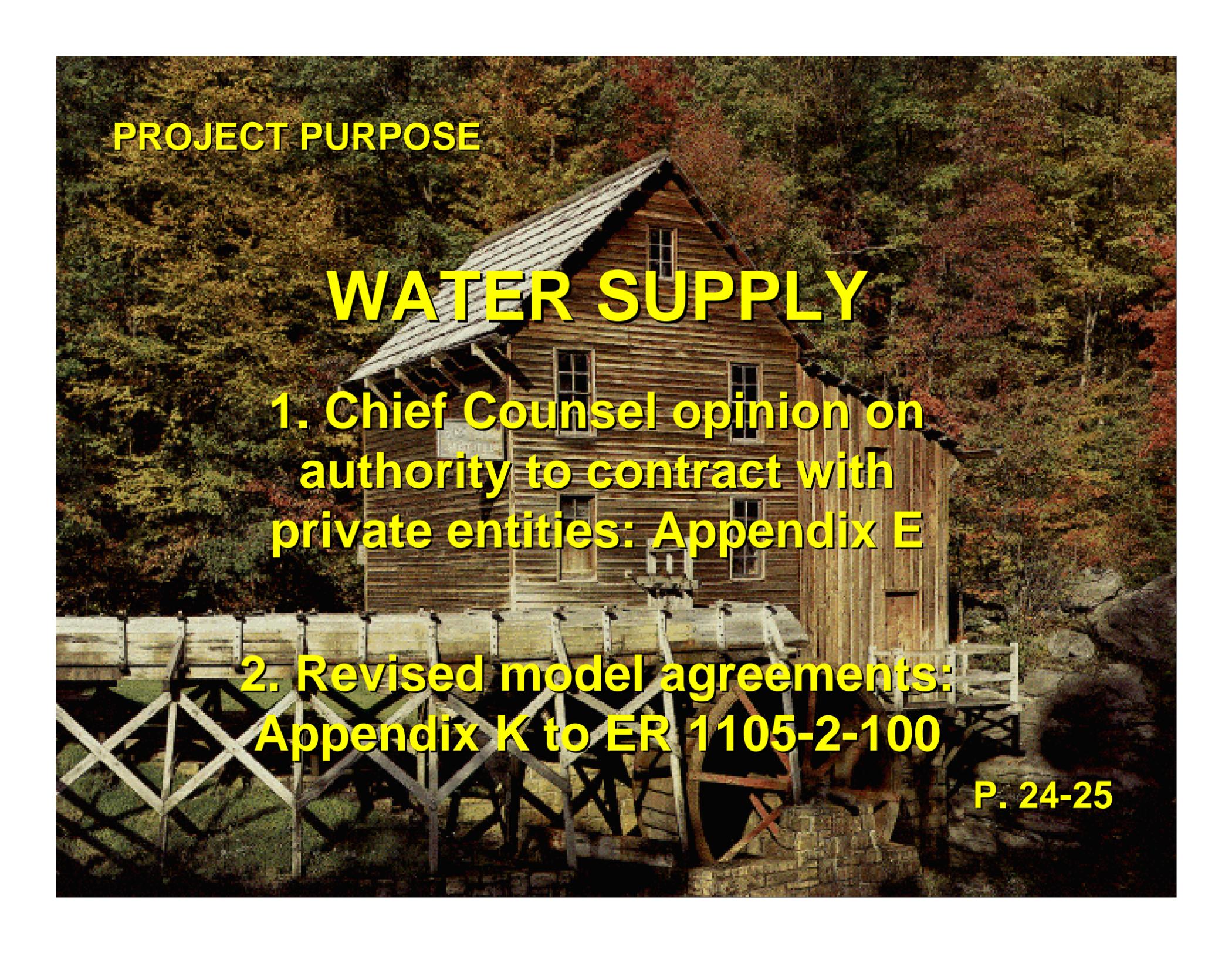


PROJECT PURPOSE

RECREATION

- 1. Budget priority**
- 2. No stand-alone projects/
work at completed projects**
- 3. Austerity/10 percent rule**

P. 23-24



PROJECT PURPOSE

WATER SUPPLY

**1. Chief Counsel opinion on
authority to contract with
private entities: Appendix E**

**2. Revised model agreements:
Appendix K to ER 1105-2-100**

P. 24-25



PROJECT PURPOSE

SHORE PROTECTION

- 1. Budget priority**
- 2. Alternative authorities**
- 3. Document project history**

P. 25-26

1. PROCESS QUESTIONS

2. AUTHORITY

3. PROJECT PURPOSE

**4. PROJECT
AREA**

5. PLAN SELECTION

6. PLAN IMPLEMENTATION

7. ENVIRONMENTAL COMPLIANCE



PROJECT AREA

PROJECT AREA CONSIDERATIONS

**1. SOCIOECONOMIC, PHYSICAL, OR
LEGAL CHANGE (may validate post-
authorization change)**

**2. ENVIRONMENTAL RESOURCES
(endangered species, critical habitat)**

3. HTRW

P. 26-27

1. PROCESS QUESTIONS

2. AUTHORITY

3. PROJECT PURPOSE

4. PROJECT AREA

5. PLAN

SELECTION

6. PLAN IMPLEMENTATION

7. ENVIRONMENTAL COMPLIANCE

PLAN SELECTION



PLAN ALTERNATIVES

**NEPA REQUIRES THAT ALL FEDERAL
ACTIONS BE INFORMED**

**ER 1105-2-100 REQUIRE THAT ALL
REASONABLE ALTERNATIVES BE
CONSIDERED**

PLAN SELECTION

ECONOMICS FOR ~~DUMMIES~~

Lawyers

P.L. 104-303, Section 301(b)

“The following projects are modified as follows, except that no funds may be obligated to carry out work under such modifications until completion of a report by the Chief of Engineers finding that such work is technically sound, environmentally acceptable, and *economic*.”

PLAN SELECTION

LOCALLY PREFERRED PLANS

- 1. ASA(CW) WAIVER REQUIRED**
- 2. “AFFORDABILITY” EXCEPTIONS
(Planning Guidance Letter 97-10)**
- 3. SPONSOR MAY PAY DIFFERENCE**

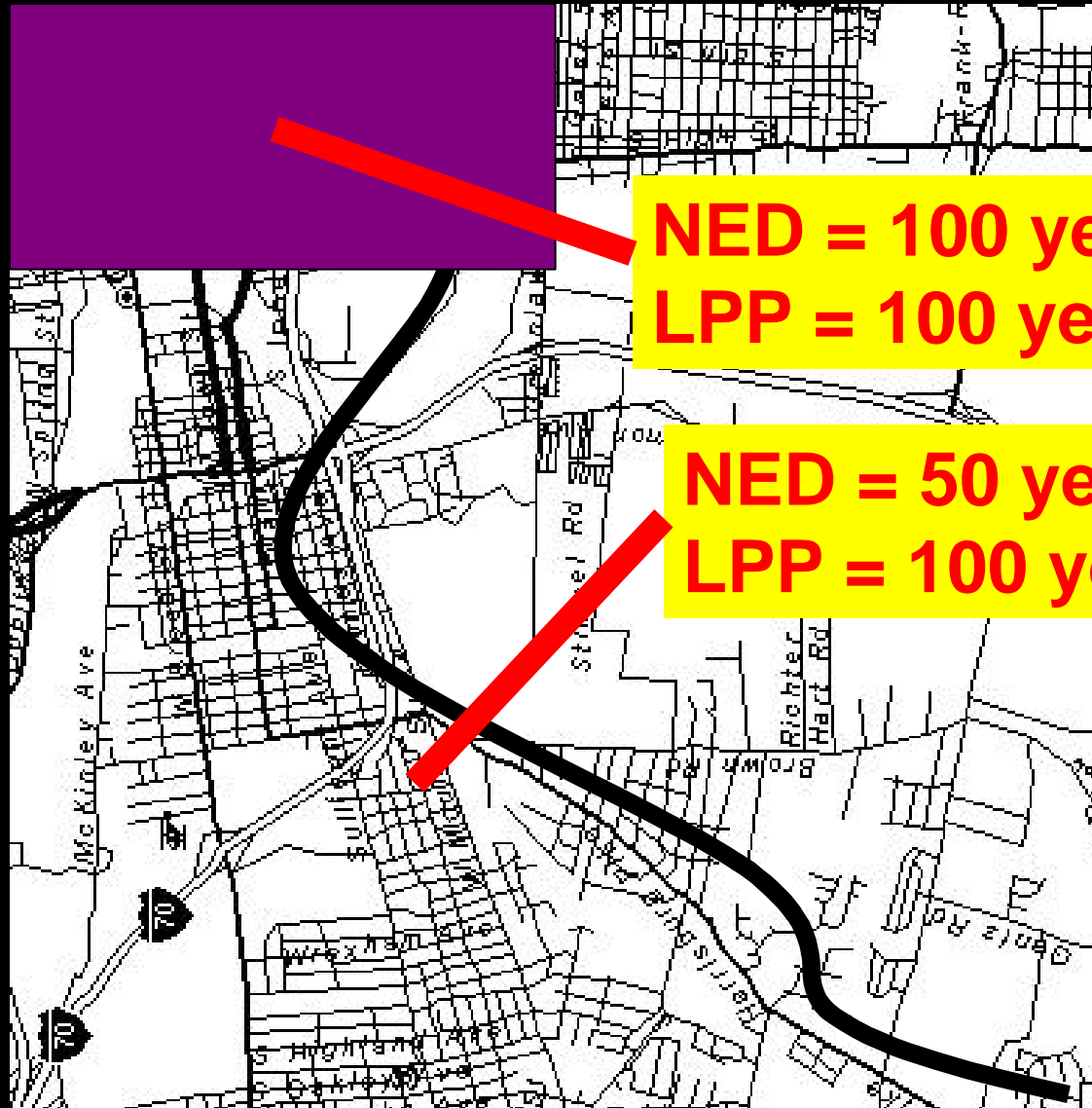
PLAN SELECTION

LOCALLY PREFERRED PLANS

**1. ASA(CW) waiver must satisfy ER
1105-2-100 paragraph 5-16:**

**Principal reason must “be based on
Federal, state, local, or international
concerns.”**

PLAN SELECTION



**NED = 100 year flood
LPP = 100 year flood**

**NED = 50 year flood
LPP = 100 year flood**

P. 28-29

PLAN SELECTION

FEDERAL
EO 12898
(Env. justice)
STATE
Floodplain
mgt regs



NED = 100 year flood
LPP = 100 year flood

NED = 50 year flood
LPP = 100 year flood

P. 28-29

1. PROCESS QUESTIONS

2. AUTHORITY

3. PROJECT PURPOSE

4. PROJECT AREA

5. PLAN SELECTION

6. PLAN

IMPLEMENTATION

7. ENVIRONMENTAL COMPLIANCE

P. 30

PLAN IMPLEMENTATION

COST SHARING/ COST ALLOCATION

**1. SHOULD MATCH PROJECT
AUTHORITY & CURRENT
POLICY**

2. ALLOCATION TABLE

**3. NARRATIVE DESCRIPTION
IN LOCAL COOPERATION
ITEMS**

P. 30



PLAN IMPLEMENTATION: COST SHARING/ALLOCATION

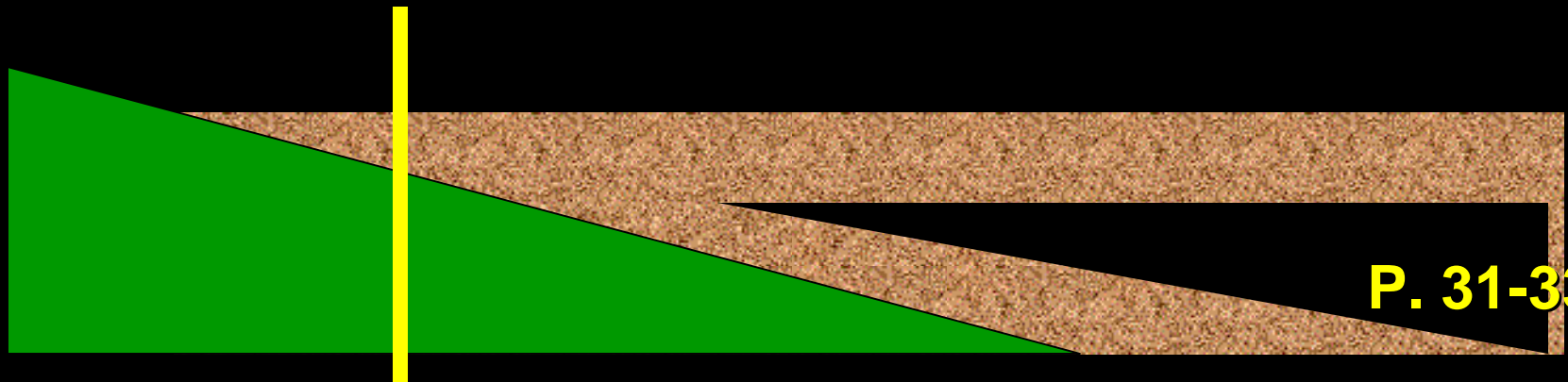
**COST SHARING
AUTHORITY EXAMPLE:
SHORE PROTECTION**

**1. Construction easements vs.
perpetual easements**

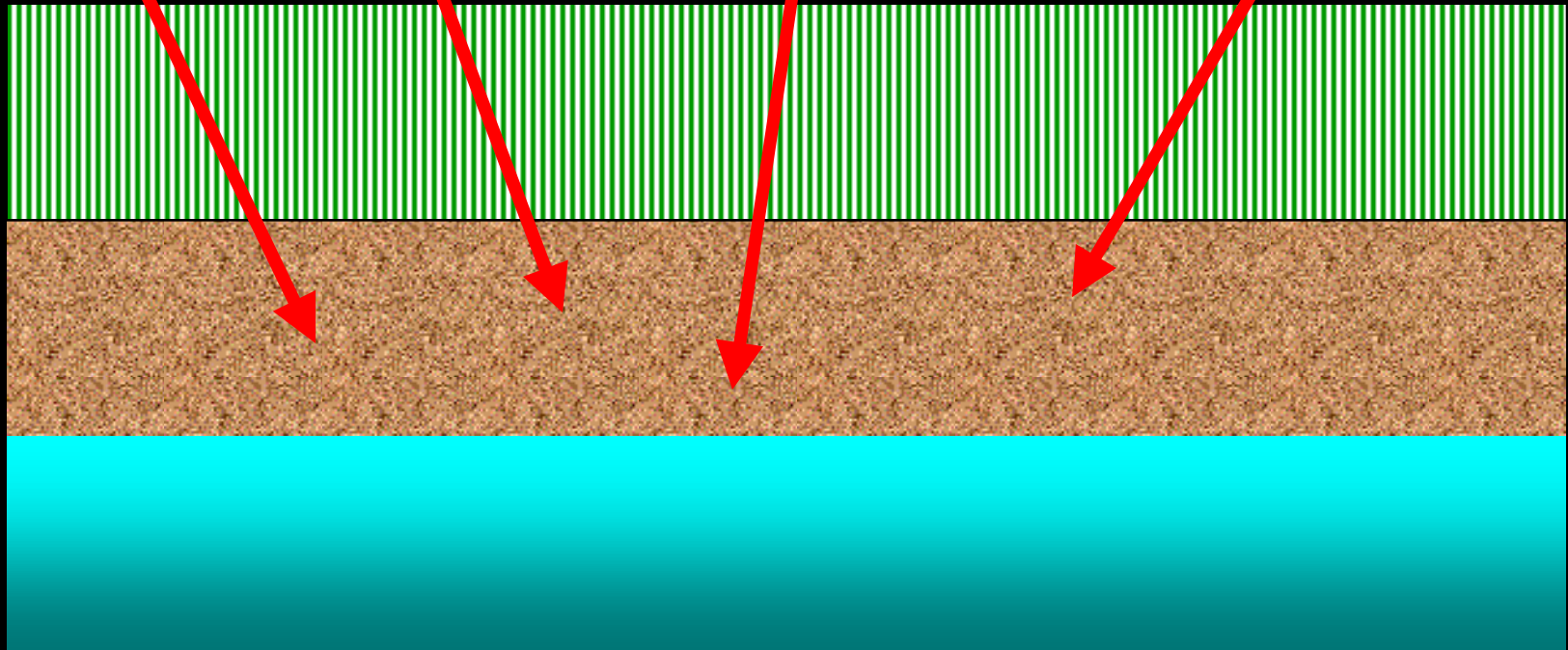
**2. Public use vs. access:
Section 103**

P. 31-33

PLAN IMPLEMENTATION: COST SHARING/ALLOCATION



PLAN IMPLEMENTATION: COST SHARING/ALLOCATION



PUBLIC ACCESS

P. 31-33

PLAN IMPLEMENTATION: COST SHARING/ALLOCATION

COST ALLOCATION TABLES

- 1. MULTI-PURPOSE PROJECTS**
- 2. NAVIGATION: disposal facilities**
- 3. FLOOD CONTROL: cost sharing**
- 4. ENVIRONMENTAL: varied authorities**

P. 31, App. D

PLAN IMPLEMENTATION

DIVISION OF PLAN RESPONSIBILITIES

1. Required by Section 221 of 1970 FCA, also ER 1105 2 100 para. 2 12.h.(1) h.
2. Aids PCA negotiation
3. Sample items in Appendix C

PLAN IMPLEMENTATION: PLAN RESPONSIBILITIES

COST-SHARING: CLEAR DESCRIPTION

“a. Provide a minimum of 35 percent, but not to exceed 50 percent of TPC as further specified below:

- (1) Prior to construction, 25% of PED;**
- (2) During construction, rest of N-F share of PED;**
- (3) During construction, 5% cash contribution;**
- (4) LERRD**
- (5) During construction, add'l \$ necessary to make total contribution = 35 percent of TPC. . .”**

P. 34-35

PLAN IMPLEMENTATION: PLAN RESPONSIBILITIES

PED COST SHARING

- “- Enter into an agreement to provide, prior to construction, 25 percent of PED costs;**
- Provide, during construction, any additional funds necessary to cover the N-F share of PED costs. . .”**

PLAN IMPLEMENTATION: PLAN RESPONSIBILITIES

COST SHARING: MULTIPURPOSE PROJECTS

“Provide 35 percent of project costs allocated to environmental restoration and 50 percent of project costs allocated to recreation . . .”

P. 35

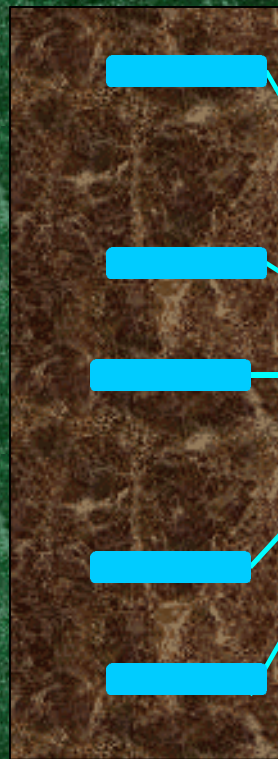
PLAN IMPLEMENTATION: PLAN RESPONSIBILITIES

OTHER REQUIRED ITEMS

- 1. Provide necessary local service facilities (BY NAME)**
- 2. Floodplain mgt. plans (2 items)**
- 3. Provide required share of cultural resource preservation (16 USC 496c)**

PLAN IMPLEMENTATION: PLAN RESPONSIBILITIES

4. WATER RIGHTS



P. 36-37

PLAN IMPLEMENTATION: PLAN RESPONSIBILITIES

OTHER REQUIRED ITEMS

**5. Pay for CERCLA cleanup and O&M
in manner to avoid CERCLA liability**

6. Protect project integrity

7. ANY SPECIAL CIRCUMSTANCES

PLAN IMPLEMENTATION

SPECIAL SPONSOR ISSUES

**1. Lack of sponsor
support for or ability
to implement plan,
features, &
purposes**



P. 39

PLAN IMPLEMENTATION

SPECIAL SPONSOR ISSUES

2. Financial analysis

(a) District assessment

(b) Sponsor plan

(c) Sponsor letter of support

PLAN IMPLEMENTATION

SPECIAL SPONSOR ISSUES

3. CREDIT FOR WORK-IN-KIND

Strict limitations

**Prior agreement & ASA/HQ approval
often required**

App. I, P. 38-43

1. PROCESS QUESTIONS
2. AUTHORITY
3. PROJECT PURPOSE
4. PROJECT AREA
5. PLAN SELECTION
6. PLAN IMPLEMENTATION

7. ENVIRONMENTAL COMPLIANCE



ENVIRONMENTAL COMPLIANCE

**PROJECT IMPACTS,
MITIGATION**

**LAWS AUTHORIZING
MITIGATION:**

**CWA, FWCA, Section 906 of
WRDA 86, & ESA**

P. 44-46

ENVIRONMENTAL COMPLIANCE

MITIGATION v. ENHANCEMENT



ENVIRONMENTAL COMPLIANCE



HTRW

**CORPS POLICY: NO CIVIL
WORKS FUNDS FOR HTRW
CLEANUP. See Model PCAs, ER
1165-2-30**

P. 46-47

ENVIRONMENTAL COMPLIANCE



HTRW

1. HTRW = All CERCLA-regulated materials
2. NOT limited to Superfund sites
3. “Non-CERCLA-regulated” exception is limited (e.g. petroleum)
4. Investigations may be cost shared

P. 46-47



ENVIRONMENTAL COMPLIANCE

COORDINATION WITH RESOURCE AGENCIES

- 1. ESA requires consultation if project area contains listed species**
- 2. If jeopardy found, deference to USFWS strongly preferred**
- 3. Anticipate timing**

P. 47-48

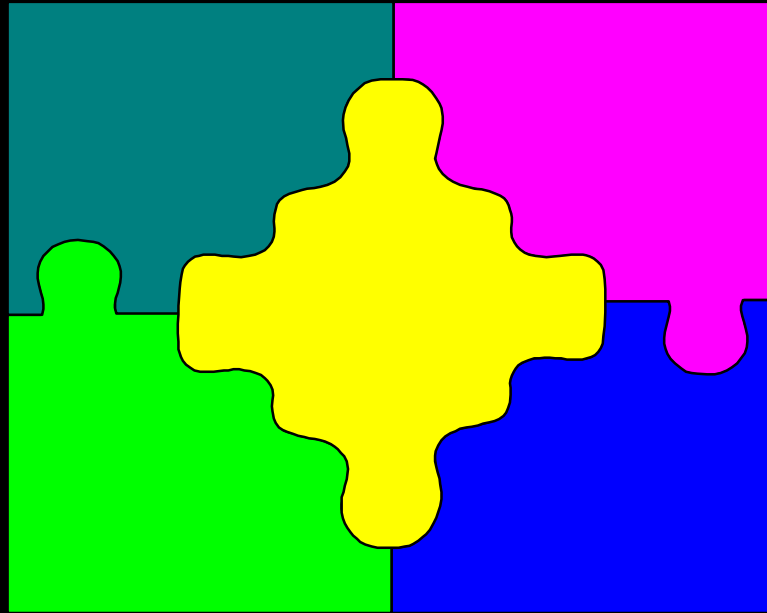
**ISSUE RESOLVED =
LESSON LEARNED**

**LESSONS LEARNED =
GENERAL THEMES**

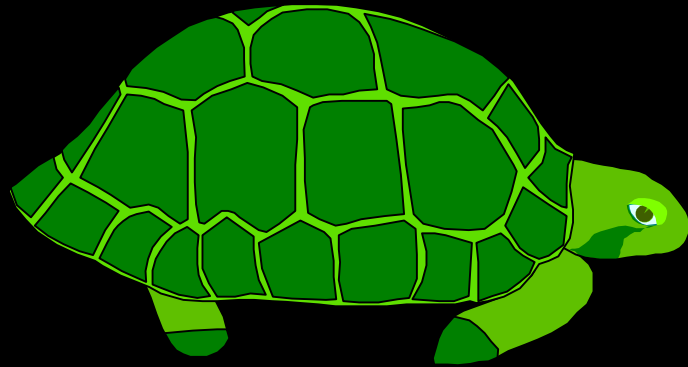


**LEARN FROM
ONE ANOTHER**

P. 2



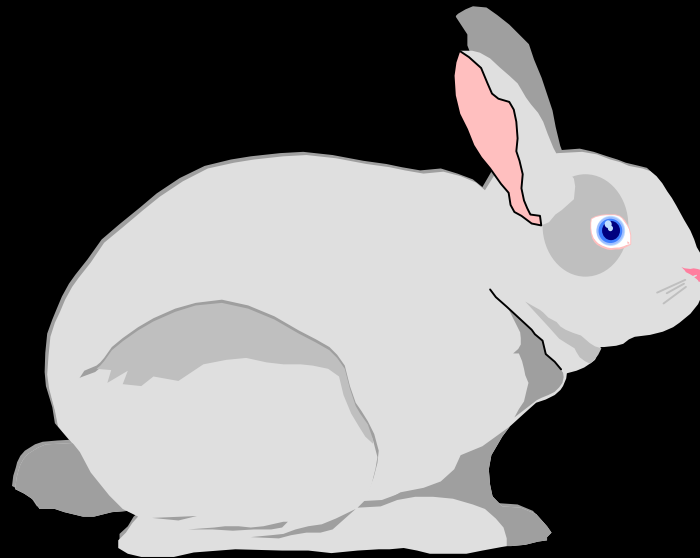
**DOCUMENT, DOCUMENT,
DOCUMENT**



CLEAR WRITING

-AVOID JARGON

**-WRITE FOR
NON-LAWYER,
NON-ENGINEER,
PUBLIC REVIEW**



need of additional water for their residential and need of additional water for their residential and need of additional water for their residential and need of additional water for their residential and need of additional water for their residential and need of additional water for
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App. H

**RECON
REPORTS
PLANNING
MEETINGS
DRAFTING
LEGISLATION**

